

No. 18709

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FORREST LAIDLEY and GEORGE P. VYE,

Appellants,

vs.

BARBARA BOGART HEIGHO, MAXWELL STEVENS HEIGHO
and SECURITY-FIRST NATIONAL BANK,

Appellees.

On Appeal From the United States District Court for the
Southern District of California, Central Division.

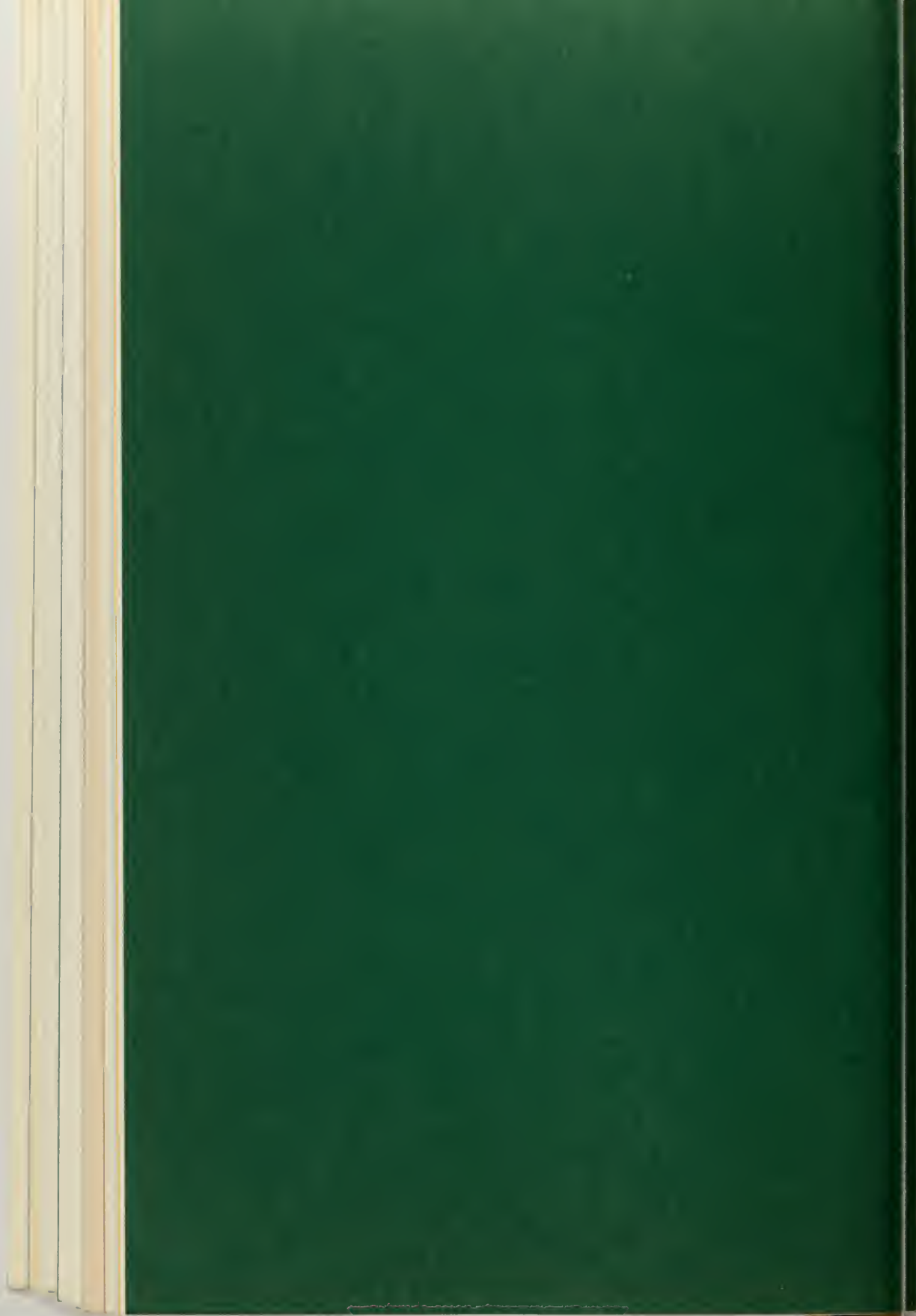
BRIEF FOR APPELLANTS.

RICHARD A. PERKINS,

202 South Hamilton Drive,
Beverly Hills, California.

Attorney for Appellants.

FILED
JUL 1963
PERKINS & PERKINS



TOPICAL INDEX

	Page
Jurisdiction	1
Statement of the case.....	2
Questions presented	5
Specification of errors.....	6
Summary of argument.....	7
Argument	8

I.

The action against appellees was not subject to dismissal on the ground of res judicata, for there was lacking identity of issues and identity or privity of parties.....	8
---	---

II.

The circumstance that appellants' probate claim against the estate of the deceased fraudulent grantor is barred does not furnish appellees as transferees an absolute defense so as to entitle them to dismissal of the action against them on motion.....	16
Conclusion	18
Appendix. Statutes	App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Armstrong v. Croft, 71 Tenn. 191.....	17
Ball v. Rodgers, 187 Cal. App. 2d 442, 9 Cal. Rptr. 666	9
Clark v. Leshner, 46 Cal. 2d 874, 299 P. 2d 865.....	15
Crain v. Crain, 187 Cal. App. 2d 825, 9 Cal. Rptr. 850	8
Del Riccio v. Photochart, 124 Cal. App. 2d 301, 268 P. 2d 814.....	9
Domestic & Foreign Petroleum Corp. v. Long, 4 Cal. 2d 547, 51 P. 2d 73.....	8
Finnerty v. Cummings, 132 Cal. App. 48, 22 P. 2d 37	15
Goldberg, Bowen & Co. v. Demick, 77 Cal. App. 535, 247 P. 2d 261.....	17
Greenfield v. Mather, 32 Cal. 2d 23, 194 P. 2d 1.....	15
Heigho, Estate of, 186 Cal. App. 2d 360, 9 Cal. Rptr. 196	4
Holman v. Toten, 54 Cal. App. 2d 309, 128 P. 2d 808	15
Johnson v. Ota, 43 Cal. App. 2d 103, 110 P. 2d 507..	8
King v. Wilson, 96 Cal. App. 2d 212, 215 P. 2d 50..	12
Liuzza v. Bell, 40 Cal. App. 2d 417, 104 P. 2d 1095..	4, 13
Markward v. Murrah, Tex., 156 S. W. 2d 971, 138 A. L. R. 246.....	17
Marshall v. Buchanan, 35 Cal. 264.....	17
Middleton, Estate of, 215 A. C. A. 367, 30 Cal. Rptr. 155	10

	Page
Pickens v. Merriam, 242 Fed. 363.....	11
Smith v. Heilman, 171 Cal. App. 2d 424, 340 P. 2d 752	8

Rules

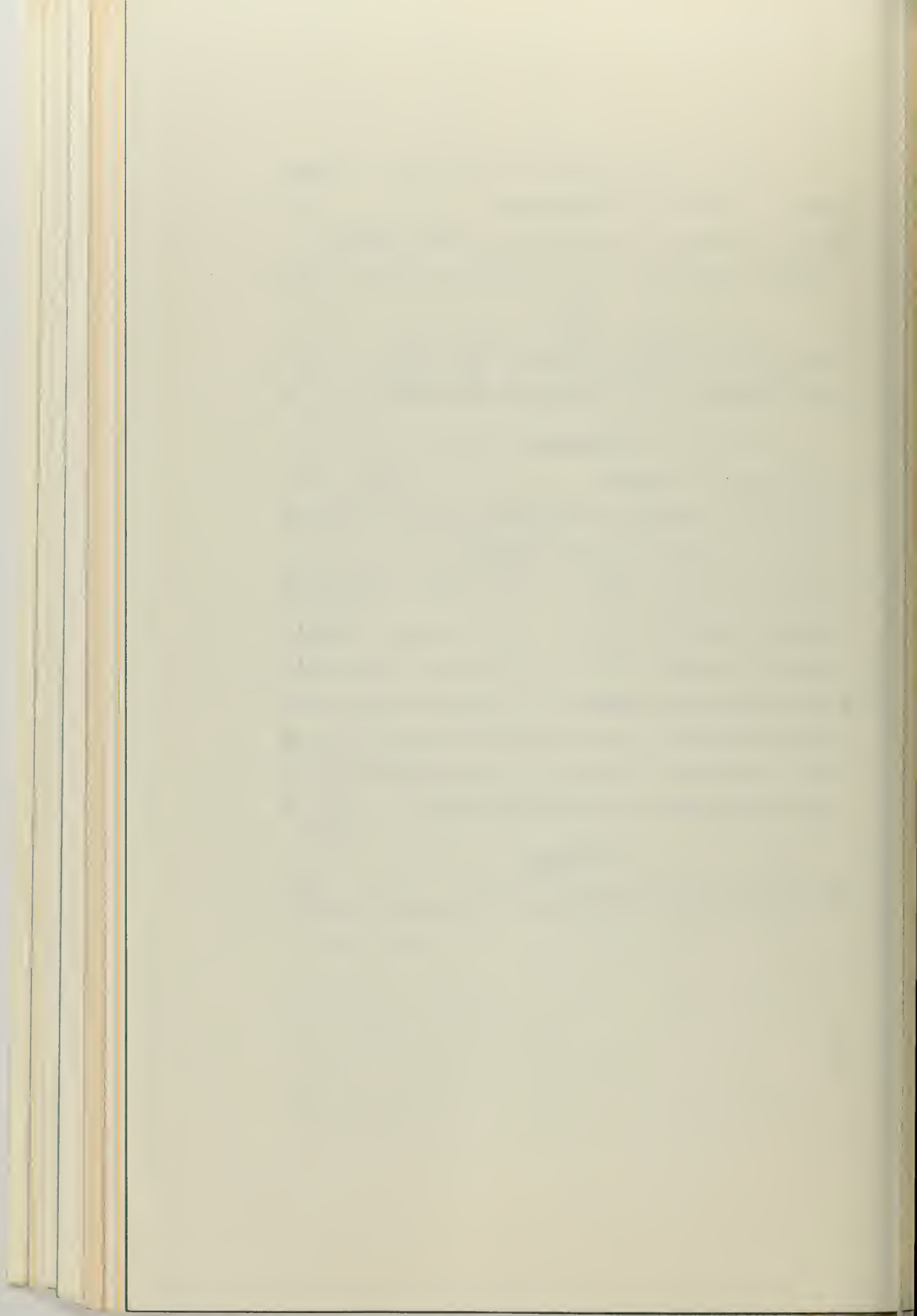
Federal Rules of Civil Procedure, Rule 8(c).....	8
Federal Rules of Civil Procedure, Rule 54(b).....	2

Statutes

Civil Code, Sec. 3439.09	16
Code of Civil Procedure, Sec. 1905.....	9
Code of Civil Procedure, Sec. 3439.09	4
Probate Code, Sec. 579.....	12, 13, 14
Probate Code, Sec. 714	10, 11
Probate Code, Sec. 1021.....	11
Probate Code, Sec. 1067.....	13
United States Code, Title 28, Sec. 1291.....	2
United States Code, Title 28, Sec. 1332(a)(1).....	2
United States Code, Title 28, Sec. 1348.....	1

Textbook

103 American Law Reports, p. 566.....	17
---------------------------------------	----



No. 18709

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FORREST LAIDLEY and GEORGE P. VYE,

Appellants,

vs.

BARBARA BOGART HEIGHO, MAXWELL STEVENS HEIGHO
and SECURITY-FIRST NATIONAL BANK,

Appellees.

On Appeal From the United States District Court for the
Southern District of California, Central Division.

BRIEF FOR APPELLANTS.

Jurisdiction.

The amended complaint alleged that both of the appellants (plaintiffs below) were citizens of Illinois and that all of the defendants, including appellees, were citizens of California.¹ And it was alleged that the matter in controversy, exclusive of interest and costs, exceeds \$10,000 [R. 1-2].² The District Court had jurisdiction

¹Appellee Security-First National Bank is a national banking association which is located in the State of California and hence, pursuant to Title 28, U. S. Code, Section 1348, is deemed to be a citizen of California for the purpose of establishing diversity jurisdiction.

²"R." refers to the clerk's transcript of record. "Tr." refers to the reporter's transcript.

of the action by virtue of 28 U. S. Code, Section 1332(a)(1).

In the District Court judgment of dismissal as to appellees was entered March 18, 1963, upon the basis of an express determination that there was no just reason for delay and an express direction of judgment pursuant to Rule 54(b), Federal Rules of Civil Procedure [R. 104-105]. Notice of appeal was filed April 9, 1963 [R. 106]. This Court has jurisdiction of the appeal by virtue of 28 U. S. Code, Section 1291.

Statement of the Case.

The amended complaint stated two claims, one against each of the two sets of defendants, alleged to be liable in the alternative. One claim (the Second) was brought against appellees, collectively referred to as the "Heigho Trust defendants," to set aside fraudulent transfers and to collect a debt of \$118,900 out of the property so transferred [R. 7-10]. The other claim (the First) was a malpractice claim alternatively asserted against five lawyers (collectively referred to as the "Surr & Hellyer defendants"), members of a firm which formerly represented appellants, on the theory that they negligently suffered appellants' claim against the Heigho Trust defendants to become barred, if in fact it is barred [R. 4-6].

On December 10, 1950, William S. Heigho became indebted to appellants' assignors in the amount of \$118,900 for brokers' commissions due under a written contract of employment. The whole amount remains unpaid [R. 4].

In 1951 William S. Heigho, for the purpose of defrauding appellants' assignors, transferred property including \$331,504.23 worth of securities into two trusts held by the predecessor in interest of appellee Security-First National Bank. The transfers left William S. Heigho insolvent. He retained the power of revocation. Appellees Barbara Bogart Heigho and Maxwell Stevens Heigho were beneficiaries of the trusts, which remained unrevoked until the death of William S. Heigho December 9, 1956; since then the trustee, appellee Security-First National Bank, has paid over \$200,000 to appellee Barbara Bogart Heigho and it now holds trust assets of more than \$175,000 [R. 4-5].

On March 19, 1954, appellants' assignors instituted an action on their claim against William S. Heigho in the Superior Court, San Bernardino County, California, but service of process on him was never effected [R. 5].

William S. Heigho died December 9, 1956. His will was admitted to probate in the Superior Court, Los Angeles County, California, and letters testamentary were issued to appellee Barbara Bogart Heigho [R. 5]. The executrix was never impleaded in the San Bernardino County action; she rejected appellants' probate claim; suit was never brought thereon; after the William S. Heigho probate proceeding was closed a petition to reopen it was denied by the Superior Court, Los Angeles County; and that order was affirmed by the California District Court of Appeal [R. 30-41]. These proceedings will be discussed below in more detail in relation to appellees' defense of *res judicata*.

Appellees moved for dismissal of the amended complaint as against them on the ground of *res judicata* [R. 12-17]. The motion was granted by order entered October 24, 1961 [R. 47-48]. Thereafter, appellants' motion to vacate the order of dismissal was denied and their motion for reconsideration was also denied in circumstances set forth below. Judgment of dismissal was entered March 18, 1963 [R. 104].

The claim against appellees is one to collect a debt out of property fraudulently transferred to them by William S. Heigho when he established the 1951 *inter vivos* trusts. Under the Uniform Fraudulent Conveyance Act, which California has adopted, a creditor need not first obtain judgment against the fraudulent transferor, but may proceed directly against transferees: Section 3439.09, California Code of Civil Procedure. The fraudulent grantor is not a necessary party: *Liuzza v. Bell*, 40 Cal. App. 2d 417, 424, 104 P. 2d 1095.

Appellees' motion to dismiss on the ground of *res judicata* was supported by the affidavit of George R. Larwill, one of appellees' counsel, to which was attached a copy of the opinion of the California District Court of Appeal in *Estate of Heigho*, 186 Cal. App. 2d 360, 9 Cal. Rptr. 196 [R. 26-41]. No copy of any judgment was submitted.

Judge Kunzel granted appellees' motion to dismiss on the ground that although "an action can be brought against a transferee without joining the transferor who made the alleged fraudulent transfer . . . under such circumstances it must appear that the claim of

plaintiffs has been reduced to judgment or is capable of being reduced to judgment” and that

“plaintiffs’ claim against the estate of the alleged debtor and fraudulent transferor is forever barred by the provisions of Section 714 of the California Probate Code for having failed to file suit [on a rejected probate claim] within the time provided.” [R. 47].

Appellants’ motion to vacate the order of dismissal [R. 49] came before Judge Carr, to whom the case had been reassigned. He commented that “under the law I don’t think there is any *res judicata* at all” [Tr. 10] and announced that he was referring the case back to Judge Kunzel to hear the motion at a time to be set by him [Tr. 16]. But Judge Kunzel never heard the motion; instead, Judge Carr took it up again at a time when it was not on the calendar and denied it [Tr. 18-29]; thereafter, he denied a motion for reconsideration and rendered judgment of dismissal [R. 104-105].

It is appellants’ position that appellees did not establish a right to dismissal on the ground of *res judicata* or otherwise.

Certain California statutes are, or may be, involved. They are set forth in the Appendix.

Questions Presented.

1. Whether appellees’ affirmative defense of *res judicata* was established on the basis of their showing, which did not include an authenticated (or any) copy of any judgment on which they relied.

2. Whether, in certain State court probate proceedings referred to, any judgment or order was made which is *res judicata* as to the issue as between appellants and appellees, namely, whether appellants may proceed against fraudulently-conveyed property in the hands of appellees.

3. Whether there was identity or privity of parties between this action and the State court proceeding so as to permit application of the *res judicata* doctrine.

4. Whether under California law the circumstance that appellants' probate claim against the estate of the deceased debtor-transferor was barred by a probate statute of limitations necessarily constitutes an absolute defense to appellants' action against fraudulently-conveyed property in the hands of appellees, who derived such property in *inter vivos* transactions and not through the debtor's probate estate.

Specification of Errors.

1. The District Court erred in granting appellees' motion to dismiss the complaint as against them.

2. The District Court erred in denying appellants' motion to vacate the order of dismissal.

3. The District Court erred in giving judgment of dismissal.

Summary of Argument.

I.

Appellees had the burden of establishing their affirmative defense of *res judicata*. They failed to do so. They did not submit an authenticated (or any) copy of any judgment to establish such a defense. What they submitted was a copy of a State appellate court opinion, which is not a judgment and of itself is not *res judicata* of anything. Nor was any of the State court proceedings therein referred to *res judicata* of appellants' claim against appellees, for the issues were not the same; also, identity or privity of parties is lacking.

II.

Under California law creditors have the right to proceed against property in the hands of fraudulent transferees, at least in some circumstances, although their remedy against the debtor-transferor is barred by limitations. Accordingly, appellees failed to establish an absolute defense on the ground that appellants' claim against the debtor-transferor's probate estate was barred by a probate statute of limitations. The action against appellees should therefore be tried; dismissal on motion was unauthorized.

ARGUMENT.

I.

The Action Against Appellees Was Not Subject to Dismissal on the Ground of Res Judicata, for There Was Lacking Identity of Issues and Identity or Privity of Parties.

Rule 8(c), Federal Rules of Civil Procedure, mentions *res judicata* as one of the affirmative defenses to be pleaded in the answer. The defense may also be asserted by motion. But however asserted, the defense is still an affirmative one which the defendant has the burden of establishing by evidence. Accordingly, a motion to dismiss on the ground of *res judicata*, if not directed to the face of the complaint, must be a "speaking" motion in the nature of a motion for summary judgment.

A party relying on *res judicata* must produce evidence of the former adjudication, which in some cases must be supplemented by evidence dehors the record to establish the scope of the prior adjudication.

Smith v. Heilman, 171 Cal. App. 2d 424, 430, 340 P. 2d 752;

Crain v. Crain, 187 Cal. App. 2d 825, 9 Cal. Rptr. 850.

Res judicata must be proved by a certified copy of the judgment relied on or other competent evidence.

Domestic & Foreign Petroleum Corp. v. Long, 4 Cal. 2d 547, 51 P. 2d 73;

Johnson v. Ota, 43 Cal. App. 2d 103, 110 P. 2d 507.

The usual way of proving a judgment is to produce a certified copy.

Section 1905, California Code of Civil Procedure.

Appellees did not submit an authenticated (or any) copy of the judgment on which they relied. Our objection here is not merely technical. It is necessary to show precisely what was adjudged and as to whom. If appellees had produced a copy of the judgment relied on the confusion which prevailed in the proceedings below might well have been avoided. But instead, they submitted a copy of a State appellate court opinion which discusses a variety of topics and much of which appears to be dictum. But an opinion is not *res judicata*:

Ball v. Rodgers, 187 Cal. App. 2d 442, 9 Cal. Rptr. 666;

Del Riccio v. Photochart, 124 Cal. App. 2d 301, 268 P. 2d 814.

For all that was said in the discursive and rather argumentative opinion of the State appellate court, its judgment merely affirmed a lower court order denying an application for reopening of the Heigho estate and for letters of administration. The order of the lower court therefore became final. If there were any *res judicata* it would have to be founded on that order. But that order was not before the District Court in this case. Reversal of the judgment of dismissal on that ground alone would be justified.

The State appellate court opinion refers to some of the lower State court proceedings upon which appellees seemingly rely. We turn to them.

First: It is shown that in the probate proceeding on Heigho's estate appellants presented a creditor's claim to the executrix, who was Heigho's widow and

one of the beneficiaries of the trust which Heigho established in fraud of creditors. She rejected the claim. The act of a decedent's personal representative in rejecting a creditor's claim is not a judgment or order: *Estate of Middleton*, 215 A. C. A. 367, 30 Cal. Rptr. 155. *Res judicata* cannot be predicated on rejection of the claim.

Second: Appellants did not sue on the rejected claim within the time prescribed by Section 714, California Probate Code. The result was that appellants evidently lost the right to payment of their claim out of Heigho's probate estate.³ If so, that was not because of any judgment or order, but because the probate statute of limitations had run after the executrix rejected appellants' creditor's claim. *Res judicata* is not involved. Appellees contend that appellants' action against them as transferees must fail because appellants' claim against Heigho's probate estate is barred by limitations. We shall discuss that contention below under Point II.

Third: The executrix' final account in the Heigho estate proceeding was approved. According to the State appellate court opinion "among the recitals in the account was one concerning the filing and rejection of the Laidley-Vye claim and the further recital that no suit based thereon had been instituted within the statutory period of three months (Prob. Code, § 714)." There is nothing else in this record to show what was in the final account, except that it may be inferred that the executrix therein accounted only for the property men-

³The estate would have been insufficient to pay appellants' claim in full in any event; appellants would have had to proceed against fraudulently-transferred property as they do now.

tioned in the probate inventory, which did not include the fraudulently-conveyed trust property now in question. Under California law, an order settling and approving an account is final as to the matters covered thereby; it is not final as to property which the personal representative wrongfully omitted to inventory: *Pickens v. Merriam* (C. C. A. 9), 242 Fed. 363.

We have never denied that the executrix rejected appellants' creditor's claim or that appellants failed to sue on the rejected claim within the time limited by Section 714, California Probate Code. If the order approving the final account is believed to be *res judicata* as to those facts, it is no matter; those facts were already conceded. But neither the final account nor the order approving it decided the question involved in this action, namely, whether appellants may proceed against fraudulently-conveyed property in the hands of appellees; as to that question there is no *res judicata*. We discuss that question below under Point II.

Fourth: In the probate proceeding there was an order of final distribution. Under California law such an order is conclusive only as to the rights of heirs, devisees, and legatees, none of which classes includes appellants: Section 1021, California Probate Code. There is no *res judicata* as to them.

The order of final distribution included an "omnibus" clause which purported to distribute "all other property of said estate whether described therein or not". Since the order was not conclusive against appellants the inclusion of the "omnibus" clause is without present significance. We point out, however, that the "omnibus" clause did not purport to adjudge any-

thing relevant to the instant action, nor could it have done so. The purpose of such a clause is to adjudge, as among the heirs, devisees, and legatees, their respective rights to property under the control of the probate court. But the trust property now in question was conveyed to appellees in 1951; they held it, and still hold it, under color of title acquired independently of Heigho's probate estate. The probate court lacked jurisdiction to decide any question of title as between the estate and anyone else (other than the personal representative) claiming property adversely to it under another title: *King v. Wilson*, 96 Cal. App. 2d 212, 215 P. 2d 50. Accordingly, the rights of appellees Security-First National Bank and Maxwell Stevens Heigho to the trust property could not have been adjudged by the probate court. The probate court would have had jurisdiction to try title as between the estate and the executrix personally if any such issue had been presented, but none was, and nothing of the sort was decided.

Fifth: The probate court denied an application to reopen the Heigho estate proceeding and appoint an administrator. That order was affirmed on appeal, as mentioned above. The application to reopen the estate was made by Robert J. Bierschbach (one of the Surr & Hellyer defendants), who wished to be appointed administrator so as to prosecute an action under Section 579, California Probate Code. The question now is whether the probate court's refusal to reopen the estate and appoint an administrator is *res judicata* as to rights which appellants assert in the instant action.

Section 579, California Probate Code, permits a decedent's personal representative to bring an action to recover property fraudulently conveyed by the decedent. This is not an exclusive procedure, but is cumulative to the right of persons asserting claims against a decedent to proceed directly against fraudulent transferees, without even joining the decedent's personal representative as a party: *Linza v. Bell*, 40 Cal. App. 2d 417, 424, 104 P. 2d 1095. And an action, either by the decedent's personal representative or by others, to avoid fraudulent conveyances must be brought in a court of general jurisdiction; the probate court does not have jurisdiction to entertain such an action.

Section 1067, California Probate Code, provides that the final settlement of an estate shall not prevent a subsequent issue of letters if other property of the estate is discovered or if it becomes necessary or proper for any cause that letters should be again issued.

The result of the foregoing is: when the probate court had before it the application to reopen Heigho's estate, all it had to decide and all it could decide was whether to issue new letters of administration. If new letters had issued the administrator could have brought an action in another court to set aside fraudulent conveyances under Section 579, Probate Code. But as we have seen, that was not an exclusive remedy. By refusing to issue new letters the probate court could not prevent creditors from bringing an independent action to set aside fraudulent conveyances. Nor, in view of its limited jurisdiction, could the probate court determine the merits of such an action if brought. What it comes down to is this: When new letters were

applied for the probate court had only two alternatives, viz.: (1) to appoint an administrator and thereby make available the cumulative remedy provided by Section 579, California Probate Code; or (2) to refuse such appointment and thereby remit creditors to their independent action in another court. The probate court chose the latter alternative. New letters were not issued; no action was brought under Section 579, California Probate Code; and appellants have brought an independent action in another court. The probate court did not adjudicate appellants' cause of action against appellees and it had no jurisdiction to do so. Accordingly, the refusal of the probate court to reopen Heigho's estate is not *res judicata* as to this action.

None of the State court proceedings reviewed above decided the question involved in the instant action, namely, whether appellants may proceed against fraudulently-conveyed property in the hands of appellees. Accordingly, there is no *res judicata* for want of identity of issues. There is also a lack of the identity or privity of parties which is necessary for the operation of *res judicata*.

None of the appellees was a party to any of the State court proceedings in question. In her capacity as executrix appellee Barbara Bogart Heigho was a party, but for *res judicata* purposes there is no identity of parties where a person has appeared in a representative capacity in one action and individually (as here)

in another: *Clark v. Leshner*, 46 Cal. 2d 874, 299 P. 2d 865; *Finnerty v. Cummings*, 132 Cal. App. 48, 22 P. 2d 37.

And none of the appellees was in privity with any party to the State court proceedings. So far as the appellees are concerned, the instant action is for recovery out of property which was fraudulently conveyed to them during William S. Heigho's lifetime and which they acquired prior to, and not through, the probate proceeding on his estate. Having acquired the fraudulently-transferred trust property prior to the institution of the probate proceeding, appellees are not successors in interest to the Heigho estate within the meaning of the *res judicata* rule: *Holman v. Toten*, 54 Cal. App. 2d 309, 314, 128 P. 2d 808.

Thus, the asserted *res judicata* for which appellees contend fails for two independent reasons, viz.: (1) want of identity of issues and (2) want of identity or privity of parties.

Lastly, it should be said that under California law, even where *res judicata* is established (as it was not here) it does not always preclude re-examination of a question. There are cases, admittedly rare, where the doctrine "will not be applied so rigidly as to defeat the ends of justice or important questions of policy." (*Greenfield v. Mather*, 32 Cal. 2d 23, 35, 194 P. 2d 1.) But this is not a case in which the limits of the doctrine need be explored, for on conventional principles it is clear that *res judicata* does not exist.

II.

The Circumstance That Appellants' Probate Claim Against the Estate of the Deceased Fraudulent Grantor Is Barred Does Not Furnish Appellees as Transferees an Absolute Defense so as to Entitle Them to Dismissal of the Action Against Them on Motion.

As we have seen, appellees' *res judicata* defense does not support the judgment of dismissal. It remains to determine whether the judgment is supportable on another ground. The only other ground suggested is what is stated in Judge Kunzel's memorandum order, which says that in order to bring an action against a transferee "it must appear that the claim of plaintiffs has been reduced to judgment or is capable of being reduced to judgment"—evidently referring to judgment against the transferor [R. 14].

But under California law, a claim need not be first reduced to judgment in order to furnish a foundation for an action to set aside fraudulent conveyances:

Section 3439.09, California Civil Code.

As to the other alternative, the District Court did not cite authority for the proposition that the claim must be capable of being reduced to judgment against the transferor in order to permit an action against transferees.

The precise question here is whether a creditor whose recourse against the estate of a deceased debtor-transferor has been lost for failure to establish a claim in probate is thereby prevented from proceeding against fraudulently-conveyed property in the hands of transferees. We have found no California decision on this

point. The question is covered in an annotation at 103 A. L. R. 566, citing cases both ways. Among them is *Armstrong v. Croft*, 71 Tenn. 191, holding that a statutory limitation on the filing of probate claims was solely for the benefit of the estate, and that a creditor could proceed against transferees of fraudulently-conveyed property despite his failure to present a timely probate claim against the estate of the deceased debtor-transferor. The case of *Markward v. Murrah*, Tex., 156 S. W. 2d 971, noted at 138 A. L. R. 246, holds that it is not necessary for a creditor to present his claim in probate and have it allowed before proceeding against property fraudulently conveyed by the decedent.

In California it seems that the running of a statute of limitation in favor of a debtor-transferor does not necessarily prevent the creditor from proceeding against transferees. In *Goldberg, Bowen & Co. v. Demick*, 77 Cal. App. 535, 247 P. 2d 261, transferees were held not entitled to assert a statute of limitations defense which was seemingly available to the debtor-transferor.

And in the old case of *Marshall v. Buchanan*, 35 Cal. 264, a fraudulent transferee was held estopped by inequitable conduct to plead a statute of limitations defense which was seemingly available to the debtor-transferor. In the instant case the evidence to be adduced at the trial may support such an estoppel. There is reason to believe that appellee Barbara Bogart Heigho actively participated in concealing the whereabouts of William S. Heigho from process servers so that service was not obtained on him in the San Bernardino County action. Also, while acting as executrix of Heigho's will she evidently gave incorrect in-

formation which led the inheritance tax appraiser to refer in his filed report to a 1946 trust rather than the 1951 trusts which Heigho established shortly after he incurred the obligation sued on. That might have thrown appellants' then attorneys (the Surr & Hellyer defendants) off the track. Such questions should be determined at a trial; they were not and could not be decided on a motion to dismiss based on asserted *res judicata*.

It is at least arguable that appellants have the right to proceed against appellees as fraudulent transferees although appellants' claim against Heigho's probate estate is barred. Appellants' doubt on this subject led them to plead alternative claims against the two sets of defendants. If either set of defendants is to be let out it should be after full inquiry into the facts at trial and not on a motion to dismiss.

Conclusion.

It is submitted that the District Court erred in granting appellees' motion to dismiss and rendering judgment of dismissal and that the judgment should be reversed and the cause remanded for further proceedings against appellees as well as the other defendants.

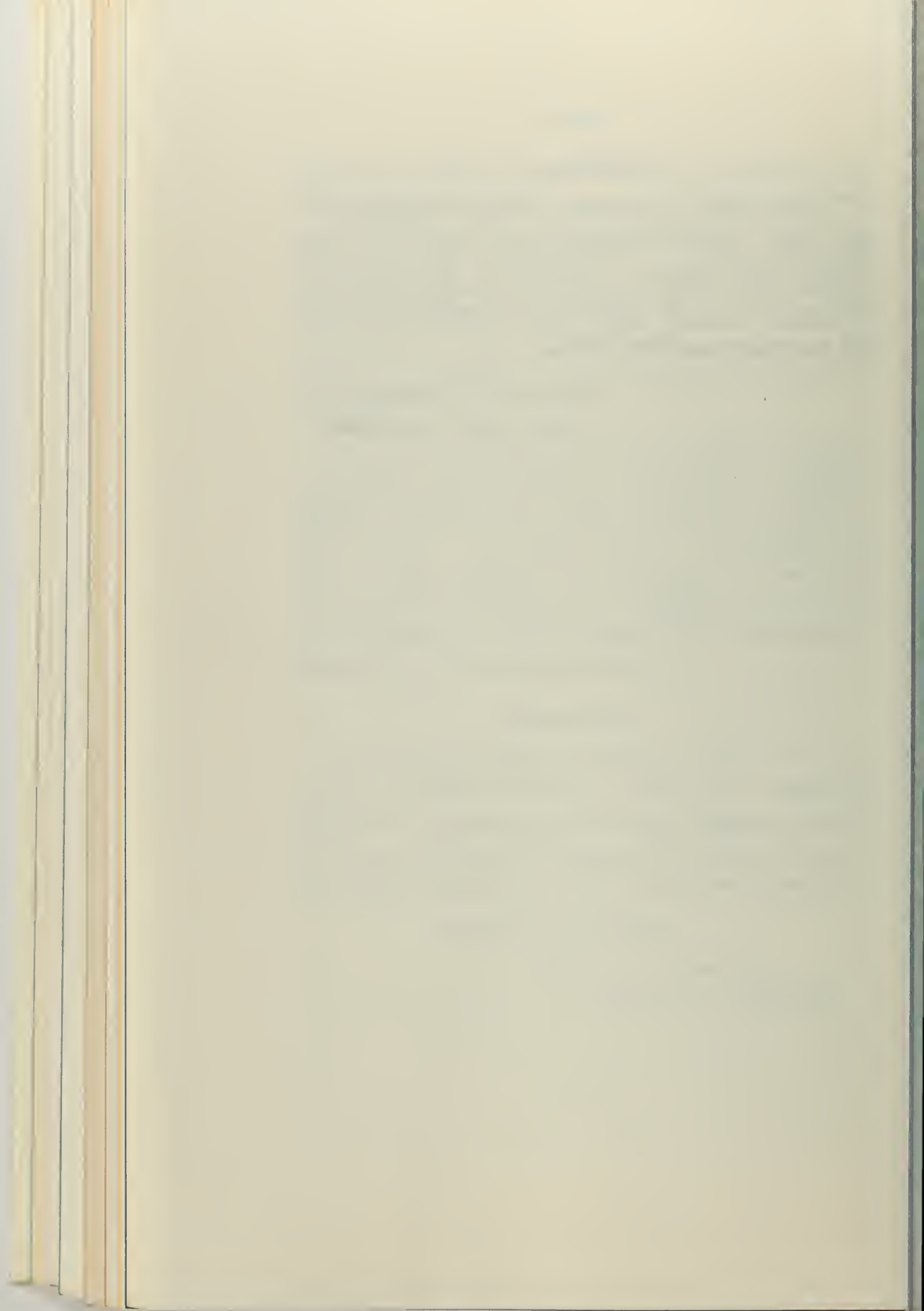
Respectfully submitted,

RICHARD A. PERKINS,
Attorney for Appellants.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD A. PERKINS
Attorney for Appellants.







APPENDIX.

Statutes.

California Civil Code:

§3439.09. (a) Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser or encumbrancer for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser or encumbrancer:

(1) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim * * *

California Code of Civil Procedure:

§1905. A judicial record of this state * * * may be proved by the production of the original, or by a copy thereof, certified by the clerk or other person having the legal custody thereof. * * *

§1908. The effect of a judgment or final order in an action or special proceeding before a court or judge of this State * * * having jurisdiction to pronounce the judgment or order, is as follows:

1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person.

2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive be-

tween the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding.

§1911. That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.

California Probate Code:

§579. If the decedent, in his lifetime, conveyed any real or personal property, or any right or interest therein, with intent to defraud his creditors, or to avoid any obligation due another, or made a conveyance that by law is void as against creditors, or made a gift of property in view of death, and there is a deficiency of assets in the hands of the executor or administrator, the latter, on application of any creditor, must commence and prosecute to final judgment an action for the recovery of the same for the benefit of the creditors.

§714. When a claim is rejected either by the executor or administrator or by the judge, written notice of such rejection shall be given by the executor or administrator to the holder of the claim or to the person filing or presenting it, and the holder must bring suit in the proper court against the executor or administrator, within three months after the date of service of such notice if the claim is then due, or, if not, within two months after it becomes due; otherwise the claim shall be forever barred. * * *

§1021. In its decree [of distribution] the court must name the persons and the proportions or parts to which each is entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree, when it becomes final, is conclusive as to the rights of heirs, devisees and legatees.

§1067. The final settlement of an estate, as in this chapter provided, shall not prevent a subsequent issue of letters testamentary or of administration, or of administration with the will annexed, if other property of the estate is discovered, or if it becomes necessary or proper for any cause that letters should be again issued.

